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No. 08-539

IN THE
Supreme Court of the United States

REPUBLIC OF IRAQ, *et al.*,

Petitioners,

v.

ROBERT SIMON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ST. MARY'S UNIVERSITY SCHOOL OF LAW, CENTER FOR TERRORISM LAW, THE HONORABLE JOE SESTAK, MEMBER OF CONGRESS, AND DISTINGUISHED AMERICAN FORMER HIGH-LEVEL MILITARY OFFICIALS, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

JEFFREY F. ADDICOTT
Director
CENTER FOR TERRORISM LAW
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228
(210) 431-2219

Counsel for Amici Curiae

221898

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether Congress intended, as evidenced in the text and legislative history of Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 (EWSAA), to authorize the President to set aside the long-standing legislative framework transferring immunity decisions from the Department of State to the courts and to strip jurisdiction from ongoing POW and "human shield" cases against Iraq in Article III courts of the United States?

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This *amicus* brief is submitted on behalf of St. Mary's University School of Law, Center for Terrorism Law, The Honorable Joe Sestak, Member of Congress, and distinguished American former high-level military officials identified at Appendix A. These officials believe that the implications for national security of the United States of setting aside the obligations of Iraq toward tortured American Prisoners of War (POWs) and human shield victims, as is sought by Iraq in its argument to this Court, would be severe. Reversal of the decision of the Court of Appeals with respect to section 1503 would directly lead to enhanced torture of American service personnel held by the enemy in future wars and would undermine military morale and recruiting.[1]

The director of the St. Mary's University School of Law, Center for Terrorism Law (CTL), is Distinguished Professor of Law, Jeffrey F. Addicott, a former Army Judge Advocate (JAG), who served in senior legal positions for the Army JAG throughout the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

world, and now specializes in national security law and terrorism law. CTL's mission is to examine current and potential legal issues related to terrorism in light of the challenge of achieving a proper balance between global security and civil justice.[2]

STATEMENT

The strength and spirit of America is personified in our military. Every U.S. conflict since Vietnam has been fought by an all-volunteer military and accompanying civilian force comprised of brave men and women who understand the inherent risks involved with being deployed for combat overseas. One of the most chilling risks associated with combat is the terrifying prospect of being held as a prisoner and tortured by enemy forces. Accordingly, it is imperative that the United States not waiver in its traditional leadership against torture of POWs.

Since the adoption of Article 56 of the Lieber Code[3] during the American Civil War, the United States has had a long-standing commitment to protecting POWs. Article 131 of the Third Geneva Convention mandates that no High Contracting Party may "absolve" a torturing State of "any liability" for grave breaches of the Convention, which includes the torture of POWs. *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1999, 6 U.S.T. 3316, 75

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[2] A list of the distinguished *amici* American former high level military officials is set forth in Appendix A.

[3] *See generally* R. S. Hartigan, *Lieber's Code and the Law of War* (1983).

U.N.T.S. 135 (1949). The United States, Iraq and every other nation in the world have ratified this Third Geneva Convention. Failure to observe this Convention would invite others to violate the law of war, undermining the United States' national security interests.

National security interests of the United States in this regard are clear. First, failing to protect the military and support personnel who defend the United States with their lives from torture and war crimes not only sets aside a clear mandate in the Third Geneva Convention, but would translate into the United States broadcasting to the world that the law of war is meaningless. As such, reversal of the Court of Appeals' decision concerning section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, 117 Stat. 559 (EWSAA), would seriously undermine America's traditional leadership role in strongly opposing torture of POWs. This, in turn, would lessen the effectiveness of the United States in ongoing law of war negotiations and in seeking international compliance with the Geneva Conventions.

Second, setting aside a core deterrent mechanism in the Third Geneva Convention (Article 131) would directly enhance the risk of torture for American personnel who fall into the hands of the enemy. America has a debt of honor to its soldiers and civilians accompanying the military to espouse a steadfast policy to "never absolve a State of any liability" for the torture of POWs. Absolving Iraq of liability would set back the United States' vital goal of deterring terrorist acts against Americans and signal to every tyrant that America does not care if our POWs are tortured.

Third, the spectacle of the U.S. Government siding with the torturers of American POWs will harm military morale and undermine military recruiting efforts. Should this Court hold in favor of Iraq over the congressionally designated legal rights of American POWs tortured by Iraq the resulting national and international attention would severely harm military morale and military recruiting efforts. No greater request can the Nation ask of its military than to go into combat to protect our interests. In turn, the brave patriots who accept this challenge have a right to expect that their Nation will do all it can to fully support them against the specter of torture should they fall into the hands of an enemy who flagrantly violates the law of war.

SUMMARY OF ARGUMENT

Based on textual analysis and legislative history it is *clear* that the Congress of the United States did not seek to erase long-standing cases in U.S. courts against Iraq and absolve it of liability for its torture of American POWs during the 1991 Gulf War or civilians held as "human shields" during that War. Accordingly, this brief is devoted to setting out a complete textual and historical analysis of Section 1503 of EWSAA and its relevance to the Foreign Sovereign Immunities Act ("FSIA") 28 U.S.C. §§ 1602–1611 (2006). *No other brief before this Court includes this detail and, as such, this amicus brief is intended to supplement the analysis presented by the parties.* This analysis decisively shows that the Congress never intended to delegate to the President the Congress' Article III power over jurisdiction. Disturbingly, this analysis also shows that

the President drafted and submitted to Congress a clause to be included in an emergency supplemental appropriation bill for the Iraq War, told the Congress in writing that the clause was designed to provide authority to remove restrictions on foreign assistance to Iraq; and then, after passage of the clause, asserted that it gave him the authority to remove the jurisdiction of an Article III court and to set aside a long-standing legislative framework which transferred immunity decisions from the Department of State to the courts. The textual analysis and history which follow speak for themselves.

ARGUMENT

I. The Text of Section 1503 Has No Plain Meaning Applying to the FSIA, Jurisdiction, or Immunity. It Does Have Plain Meaning Applying to the Foreign Assistance Act.

A. The Broadest Textual Context.

This Court's task is to interpret the words of Section 1503 of EWSAA in their context and in light of the purposes Congress sought to serve. *See e.g.*, *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (in their context); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) (in light of the purposes Congress sought to serve). The clause in question, a short proviso to a general provision permitting the President to suspend application of the Iraq Sanctions Act reads: "Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to

countries that have supported terrorism." EWSAA § 1503. It should initially be noted that this proviso appears in a *textual context* under a heading "GENERAL PROVISIONS. THIS CHAPTER" concluding EWSAA's Chapter 5 that is itself titled "BILATERAL ECONOMIC ASSISTANCE FUNDS APPROPRIATED TO THE PRESIDENT United States Agency for International Development CHILD SURVIVAL AND HEALTH PROGRAMS FUND." In turn, this Chapter 5 appears in Title I entitled "WAR-RELATED APPROPRIATIONS," and the official title of the Act itself is "Emergency Wartime Supplemental Appropriations Act, 2003." Note that the clause does not appear in an act, title, chapter, or section of a chapter, that makes any reference to the FSIA, sovereign immunity, jurisdiction, judicial procedure, pending cases, torture, POWs, or Iraqi responsibility for torture of American POWs or human shield victims. Nor does its text reference any of these subjects.[4]

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[4] The only reference in EWSAA to the judiciary is contained in a separate Chapter of Title I which merely provides additional appropriations for police enhancements and court security for three named courts, *not including* the District Court for the District of Columbia. See Title I, Chapter II of EWSAA.

B. The Primary and Secondary Meanings of "Or."

The first textual ambiguity is whether the short proviso in question means that the President can make irrelevant in the alternative *either* "section 620A of the Foreign Assistance Act of 1961" *or* "any other provision of law that applies to countries that have supported terrorism." Both dependent clauses are linked by the coordinating conjunction[5] "or" in the text; not by "and." The primary meaning of "or" is that it indicates an alternative choice; that is, it means not both.[6] Thus the

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[5] For the meaning of "coordinating conjunction" and "dependent clauses" see William A. Sabin, *The Gregg Reference Manual* (7th ed. 1994), at 471 (dependent clauses) and 472 (coordinating conjunctions).

[6] *See, e.g., The Concise Oxford Dictionary* (4th ed. 1951); *Random House Dictionary of the English Language* (Unabridged 1967); *Websters New World Dictionary of American English* (3d ed. 1988).

The *Random House Dictionary*, above, has the following definition of "or" at page 1011:

> **Or** . . . . *conj.* **1.** (used to connect words, phrases, or clauses representing alternatives): *to be or not to be.* **2.** (used to connect alternative terms for the same thing): *the Hawaiian or Sandwich Islands.* . . .

The significance of this order ranking of meanings, *e.g.,* **1** and **2** as above, is set out in the Guide to the Dictionary at *xxix* as "The most common part of speech is listed first, and the most frequently encountered meaning appears as the first definition for each part of speech." No meaning of "or" in the English language means "and."

(Cont'd)

primary *textual* meaning of this phrase is that the President could suspend either section 620A or any other provision of law that applies to countries that have supported terrorism. On May 7, 2003, Presidential Determination No. 2003-23 specifically made inapplicable section 620A. Under the primary textual meaning, the President would be unable to suspend any other provision of law. To avoid this primary textual meaning, the President's May 7 Determination simply rewrites the "or" in the text as "and," declaring: "I hereby . . . make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the 'FAA'), *and* any other provision of law that applies to countries that have supported terrorism" Pres. Deter. 2003-23, 68 Fed. Reg. 26549 (May 7, 2003) (emphasis added). *Amici* do not assert that this primary textual meaning is, in fact, the intent of Congress. However, the point is that to ascertain that intent properly and move beyond this *primary textual meaning* requires a review of the legislative history.

A second textual ambiguity relates to the scope of laws included within the second of the dependent clauses "any other provision of law that applies to countries that

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(Cont'd)

The *Random House Dictionary of the English Language* further defines "and", which does not include any of the meanings of "or." *Id*. at 55. And it defines "and/or" as a construction used to indicate that either "and" or "or" is appropriate for linking the words or phrases. Clearly "or" alone is not "and/or."

"Or" as a coordinating conjunction has no specialized legal meaning and does not appear in *Blacks Law Dictionary.*

have supported terrorism." The first point to note here is that if the coordinating conjunction "or" is not used in its primary sense (meaning "not both") then it is being used in its secondary sense, which is that of linking synonymous words or phrases or introducing an alternative on an equal footing with the preceding; that is, "botany, or the science of plants."[7] Under this textual interpretation of the phrase, the second dependent clause takes its meaning from the first. Since the first dependent clause of section 620A of the Foreign Assistance Act of 1961 is a provision restricting foreign assistance to terrorist States, then the meaning of the second dependent clause is also limited to provisions restricting foreign assistance to terrorist States, and preferably only provisions contained in the Foreign Assistance Act as is specifically named in the first dependent clause.[8] *Amici* believe that this textual meaning of the overall phrase is the better

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[7] *Id.*

[8] From legislative history one also sees another similarity between the content of the first and second dependent clauses. That is, the Administration told the Speaker of the House that the purpose of § 1503, in addition to setting aside the Iraq Sanctions Act, was to enable the President to make inapplicable three laws, all of which were provisions of Title 22, Chapter 32, as sections of the Foreign Assistance Act of 1961. No provision of Title 28 was identified. Thus, the laws identified by the Administration as the very purpose of § 1503, were, on both sides of the proviso, provisions of the Foreign Assistance Act of 1961. Indeed, Chapter 32 of Title 22 of the U.S. Code, in which all three of these identified laws reside, is itself entitled FOREIGN ASSISTANCE. That is certainly further evidence of the correct meaning of this proviso as linking equivalence.

interpretation of that phrase as reflected in the overall context and legislative history of this proviso. Certainly this plain *textual* meaning of the phrase does not include exclusion of jurisdiction from an Article III court over pending cases nor has anything to do with the liability of Iraq for the torture of American POWs or "human shield" victims. The FSIA, a provision of law relating to civil actions in the courts, is not a provision of law that relates to foreign assistance and is by no means a synonymous law with section 620A of the Foreign Assistance Act of 1961, nor is it contained in the Foreign Assistance Act.[9] As such, under this textual meaning neither the FSIA, nor jurisdiction of an Article III court, nor pending cases, nor immunity, nor Iraq's accountability for the torture of American POWs during

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[9] 22 U.S.C. 2151 (2006). Section 620A of the Foreign Assistance Act of 1961 also sets up a process for determination by the Secretary of State of governments supporting international terrorism and for rescinding such determinations or waiving prohibited assistance. In addition to not relating to foreign assistance, the FSIA, which relates to civil actions in the courts, contains no such provisions for determination or rescission of terrorist states nor provision for waiving prohibited foreign assistance. As such, it is not an equivalent or parallel law to § 620A in any way. Further, § 620A relates to determinations and rescission concerning *governments* supporting international terrorism while the FSIA, relates to s*tate* sponsors of terrorism. The difference here is crucial, since the FSIA, in § 1605(a)(7), makes it clear that the critical time for the designation of terrorism is at the time the act occurred for which one is bringing a civil action. Thus, the FSIA, which deals with *state liability that under national and international law transcends any particular government,* fully sanctions civil actions for past actions even after a change of government resulting in a removal of the terrorist designation.

the Gulf War are in any way implicated by this provision. The Presidential Determination simply rewrites the inconvenient "or" as "and," a word with a very different meaning than the precise language used by the Congress "or" as linking the dependent clauses. Interpretation of this full proviso by reading its two clauses together as having meaning linked by the coordinating conjunction "or" is also supported by long established canons of construction. "[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, [w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dept of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (internal quotations omitted)). Finally, in connection with this second textual ambiguity, it is evident that Iraq wants to treat the first dependent clause in the proviso, that is, the language "section 620A of the Foreign Assistance Act of 1961" as though it did not exist. A textual interpretation should be favored that gives meaning to *all* of the relevant language in construing dependent clauses.

C. The Scope of the Dependent Clause Issue.

A third textual ambiguity, relating to the scope of laws covered by the second dependent clause, is whether these laws are intended to be those which "only" apply to terrorist States, or are instead intended to include those which apply to terrorist and non-terrorist States, a virtually unlimited scope to draw from the full panoply

of the law of the United States. It should be noted here that sections 1605(a)(7) and 1610 of the FSIA, two of the three laws specifically invoked by the President in his May 22nd message, *do* apply to both terrorist and non-terrorist States. For under section 1605(a)(7) it is terrorist designation at the time the act occurred that is the critical date, and suits are fully sanctioned in such settings even after a terrorist designation is removed. *That is,* even if the President had complied with the detailed provisions of section 620A of the Foreign Assistance Act of 1961, in rescinding the terrorist designation of the Government of Iraq, actions would still lie against Iraq for the torture committed by that State at a time when it was so designated, even if it is no longer so designated.[10]

D. The Meaning of "Make Inapplicable."

A fourth textual ambiguity relates to the meaning of the cryptic phrase "make inapplicable" as used in the proviso. Does this mean that the laws in question may be changed for the future, as the tense suggests, *as though Iraq were no longer designated a terrorist*

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[10] Even more broadly, by seeking to include all of § 1610 of FSIA within the Presidential Determination, rather than simply those provisions of that section which apply at least some of the time to terrorist States, that is §§ 1610(a)(7), (b)(2) and (f)(2), the Executive has shown that it seeks to interpret § 1503 delegated authority to apply to *any* law affecting Iraq, whether or not that law has anything to do with countries that have supported terrorism. Thus, the Executive quite literally has interpreted § 1503 with respect to this third textual ambiguity in the broadest possible way, while continuing to maintain that the text of the proviso has only a single plain meaning.

State?[11] Or does it mean that Congress really intended to treat Iraq retroactively *as though it never were a terrorist State*? The first of these interpretations would not in any way affect the applicability of FSIA, which, as has been seen, provides that the critical date for terrorist designation is at the time the act occurred serving as the basis for the action. In this case, that means Iraq in 1991, under the tyrannical—and terrorist designated—rule of Saddam Hussein. This first interpretation would also seem supported by the natural forward looking meaning of the language "make inapplicable." The second interpretation, a retroactive meaning, which would be a necessary interpretation in order to absolve the past liability of Iraq while designated a terrorist state, would not at all seem a normal intent of Congress.[12] This interpretive issue, not

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[11] This would, for example, permit the Executive to treat the *de facto* setting without a government in Iraq as though the designation "terrorist" had been rescinded without the necessity of meeting the specific requirements for such rescission set out in 620A of the Foreign Assistance Act of 1961, including a variety of specific requirements concerning the state of the government of the country at a time when there was no government of Iraq. That would seem the principal purpose of this unclear phraseology.

[12] One example of the implausibility of the Government's position that Congress intended § 1503 to apply retroactively as though Iraq had *never been designated* a terrorist State, rather than a forward looking interpretation as though Iraq were *no longer designated* a terrorist State, is the absurdity of assuming that Congress intended to permit the President to set aside pending prosecutions against those who unlawfully

(Cont'd)

resolved by any asserted plain meaning of the text, forces us to ask the real question with respect to this historic case. Is there a shred of evidence in the text or history of this proviso that the Congress sought retroactively to absolve Saddam Hussein and Iraq of liability for the brutal torture of American Gulf War POWs or "human shield" victims? This question answers itself. By ignoring this serious textual ambiguity, Iraq commits the common logical errors both of *petitio principii*, or question begging, and of a *non sequitur* when it first asserts that the language "make inapplicable" makes section 1605(a)(7) inapplicable to Iraq, and then that it follows that this removes subject-matter jurisdiction from pending cases. The first of these assertions illogically seeks to serve as its own proof, and the second simply does not logically follow from the first.[13]

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traded with Iraq prior to the liberation of that country. The traditional international law rule, which also reflects the official position of the United States, is that "States" remain liable for the actions of prior governments. Any other rule would severely harm stability in international relations.

[13] Yet another textual ambiguity inherent in the phrase "may make inapplicable" is whether the phrase authorizes the President to determine applicability law by law, or even case by case if the phrase is interpreted to apply to pending cases as Iraq asserts. This ambiguity, not resolved by the text itself, creates troubling issues of interference with "[t]he judicial Power of the United States." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-18 (1995) (an effort to set aside the final judgment of an Article III Court by retroactive legislation held unconstitutional).

E. The Temporal Problem and the Sunset Clause

A fifth textual ambiguity is easily overlooked, because *it is rooted in the absence of text*. Thus, there is no text setting out the intent of Congress as to whether section 1503 is intended to authorize retroactive application or to authorize retroactive removal of jurisdiction of an Article III court in order to effectively absolve Iraq of liability for its torture of American POWs. Iraq is driven to arguing that the language "may make inapplicable" and the language "countries that have supported terrorism" somehow support its interpretation that section 1503 is intended to approve retroactive application. But to argue that the use of the present tense and signaling contingent future action (may make inapplicable) supports retroactive effect does not hold water. Nor does the use of the present perfect tense in the phrase "countries that have supported terrorism" help. This is simply a natural way of describing a class of countries which have been designated State sponsors of terrorism. Of course such countries can be so designated only after they *have supported terrorism.*

But the clause in question, however, and the proviso of which it is a part, do not at all address the question of temporal effect. If any temporal conclusion is to be drawn from the text of section 1503, it is that describing a contingent future event (may make inapplicable) signals future, not retroactive, effect.

Further, certainly the sunset provision in the broader textual context of section 1503 would also seem to counteract any argument that anything in that section was intended to apply to pending court cases. Clearly there is an absence of text in section 1503 specifically addressing

the temporal reach of whether any authorized action could operate retroactively, much less retroactively remove the jurisdiction of an Article III court.

In answering the above textual ambiguities it is relevant also to put the proviso in its broader *textual* context. That context is inclusion of the clause in question as a proviso to a section permitting the suspension of any provision of the Iraq Sanctions Act of 1990, as part of a chapter (five) dealing with "BILATERAL ECONOMIC ASSISTANCE," as part of a broader Title I of the Act dealing with "WAR-RELATED APPROPRIATIONS," and as part of an Act officially designated as the "Emergency Wartime Supplemental Appropriations Act, 2003." It should be noted that the Iraq Sanctions Act of 1990, the lead subject of section 1503, as with the Act, Title of the Act, Chapter of the Title, and Section of the Chapter, also contains no reference to the FSIA, jurisdiction, immunity, judicial procedure, or POWs, much less pending cases. Nothing in this context suggests any congressional intent to deal with these issues, much less to retroactively remove the jurisdiction of an Article III court and absolve Iraq of its liability for the brutal torture of American POWs or mistreatment of American "human shields."

Rather, the broader textual context supports the more natural interpretation of the phrase itself, that it was intended to permit removal of restrictions on foreign assistance to Iraq contained in sections of the Foreign Assistance Act. This latter interpretation is also supported by the text of the final proviso in section 1503 which sets a sunset date for the authorities contained within the section to expire. This sunset provision is perfectly consistent with continued congressional

control of foreign assistance, and temporarily waiving existing prohibitions on assistance to Iraq. But it does not make sense for Congress to intend to retroactively remove the jurisdiction of an Article III court and absolve Iraq of its liability for the torture of American POWs and then have the authority for this extraordinary action expire. Iraq's interpretation here would imply that section 1503 would operate retroactively to restore Iraq's sovereign immunity for all of its earlier terrorist actions and remove the jurisdiction of the courts over pending cases; and then on the sunset date it would abrogate that immunity anew. Iraq offers no explanation as to why Congress would legislate in such a peculiar fashion.

This Court has also held that a proviso should be interpreted in relation to its principal clause and the purpose that it serves within the statute as a whole. *See, e.g.*, *United States v. Morrow*, 266 U.S. 531, 534–35 (1925) (stating that grammatical and logical scope of a proviso is confined to "the subject-matter of the principal clause"). Here, the principal clause in section 1503, to which the proviso is appended, deals simply with suspending the application of the Iraq Sanctions Act of 1990, and the entire section simply deals with assistance to, and commercial transactions with, Iraq.

In short, Iraq's assertion that a "plain" or "manifest" meaning of the text of section 1503 of EWSAA compels its interpretation that Congress intended to retroactively remove the effect of the FSIA over pending actions against Iraq, including removing the jurisdiction of an Article III court and effectively absolving Iraq of its liability for the torture of American POWs and

mistreatment of American "human shields," is not supported by that text. What is supported as the compelling interpretation of that text is that Congress intended simply to permit removal of restrictions on foreign assistance to Iraq. This is the *only* interpretation consistent with the legislative history of section 1503. Perhaps that is why Iraq and the Executive virtually ignore the legislative history. But at least five issues in textual interpretation, any one of which would be fatal to Iraq's asserted plain meaning, require a broader review of context, including the text of EWSAA as a whole and the legislative history of section 1503 of that Act, in order to effectively interpret and carry out the intent of Congress.

Iraq and the Executive are, in their arguments, also inconsistent in their approach to statutory interpretation of section 1503. While they urge this Court that the text is manifest, and they studiously refrain from citing the legislative history which cuts against their interpretation, they urge interpretation of the section against a broad backdrop of presidential actions relating to Iraq.

II. The History of Section 1503 Does Not In Any Way Refer to the FSIA, Jurisdiction, or Immunity, but Rather Clearly Shows that This Section Was Intended to Permit Removal of Limitations on Assistance to Iraq.

A. Overall Legislative History of Section 1503.

As with the text of section 1503 of EWSAA, it should be noted at the outset that nothing in the legislative history of this section even mentions the FSIA, jurisdiction, immunity, the judiciary, judicial procedure, the courts, POWs, or Iraq's liability for torture of American POWs or human shield victims.

B. The President's Submission to Congress.

The genesis of what became this proviso in section 1503 is a presentation to the Congress from the Office of Management and Budget on March 25, 2003, submitted over a letter from the President to the Speaker of the House. The letter said with respect to the purpose of the President's request to the Congress:

> Today, I submit a request for 2003 supplemental appropriations to support Department of Defense operations in Iraq and to strengthen the capabilities of our friends and allies who will share the burden of military and stabilization activities. . . . I ask the Congress to appropriate the funds as

> requested, and promptly send the bill to me for signature.[14]

It would be hard to mistake that this was a request with respect to funding, not FSIA or the judiciary. Similarly, the OMB letter to the President, forwarding a detailed memorandum on the request, which was then sent with the President's letter to the Speaker, said as to the purpose of the submission:

> Submitted for your consideration are requests for FY 2003 supplemental appropriations that would provide funds to cover military operations, relief and reconstruction activities in Iraq, ongoing operations in the global war on terrorism, enhancements to the safety of U.S. diplomats and citizens abroad, support for U.S. allies critical to succeeding in the war, and homeland security protection and response measures.[15]

The purpose is supplemental appropriations, not the FSIA, the jurisdiction of the courts, immunity, or pending cases. None of these are mentioned in either

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[14] Letter from President George W. Bush to the Honorable J. Dennis Hastert, Speaker of the House of Representatives, at 1 (Mar. 25, 2003), *in* H.R. Doc. No. 108-55 at 1 (2003).

[15] Attachment to letter from Mitchell E. Daniels, Jr., the Director of the Office of Management and Budget to President George W. Bush, *conveyed on* March 25, 2003 to the Honorable J. Dennis Hastert, Speaker of the House of Representatives from President George W. Bush, *in* H.R. Doc. No. 108-55 at 3 (2003).

the President's letter to the Speaker or the Director's letter to the President, as is also true of the entire legislative history of section 1503. More specifically, the language which became section 1503 was submitted to the Speaker of the House as an attachment to the Director's letter. As it went to the Speaker it provided in relevant part as to recommended statutory language *and the purpose of that language*:

> Sec.____. *The Iraq Sanctions Act of 1990 is hereby repealed: Provided, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Pub. L. 102-484): Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, as amended, or other provision of law that applies to countries that have supported terrorism: Provided further, That section 307 of the Foreign Assistance Act of 1961, as amended, shall not apply with respect to programs of international organizations for Iraq: Provided further, That provisions of law that purport to direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq should not be construed as applying to Iraq.*
>
> This provision would repeal the Iraq Sanctions Act of 1990, which requires the President to continue an embargo on Iraq and

> impose certain mandatory sanctions against Iraq, including prohibitions on arms sales, certain exports, foreign assistance and Export-Import Bank Credits. It would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act.[16]

Once more, there is no reference to the FSIA, jurisdiction, immunity, the judiciary, the courts, POWs, or human shield victims, much less retroactive removal of jurisdiction over pending cases from an Article III court, either in the submitted language or the explanation as to its purpose.

This language became the basis for the language in the House bill that became section 1503 of EWSAA. As such, absent any indication to the contrary in the record as to a changed purpose of this language, the explanation of its purpose put forth by the Administration to the Congress is highly significant. The Administration's statement of purpose was clear: the language was intended to authorize the President to make inapplicable with respect to Iraq "section 620A, and section 620G, and section 307 of the Foreign Assistance Act," period. These sections of the Foreign Assistance Act deal with prohibitions on foreign

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[16] *See id.* at 26 ("GENERAL PROVISIONS" section of the Director's letter to the President of March, 25, 2003, conveyed to the Speaker, which set out specific recommended statutory language along with a description of the purpose of the language).

assistance. Section 620A (22 U.S.C. § 2371) is entitled "Prohibition on assistance to governments supporting international terrorism" and deals with broad prohibitions under a number of assistance laws if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism. This section also sets up a detailed procedure for rescinding such determinations and for waiving prohibited assistance. Section 620G (22 U.S.C. § 2377), entitled "Prohibition on assistance to countries that aid terrorist states," provides for a withholding of assistance to governments which provide assistance to countries on the terror list. It furthermore provides a detailed procedure for waiving the prohibitions on foreign assistance imposed by the section. Finally, section 307 (22 U.S.C. § 2227), entitled "Withholding of United States proportionate share for certain programs of international organizations," establishes prohibitions on assistance from United States funds channeled through international organizations.

Consequently, all three of these sections, from Title 22, Chapter 32, Foreign Assistance, of the United States Code, deal with prohibitions on foreign assistance to terrorist governments. None deal with the FSIA, civil suits, jurisdiction, immunity, the judiciary, the courts, judicial procedure, POWs, human shields, or pending cases. Nor are any from Title 28, the judiciary title. And the lead purpose of the section, the Iraq Sanctions Act, deals with sanctions against Iraq and does not deal with the FSIA, jurisdiction, the judiciary, immunity, judicial procedure, the courts, POWs, or pending cases. The purpose of this language, as conveyed to the Speaker

of the House, was quite simply to permit the President to make inapplicable these provisions of the Foreign Assistance Act of 1961, prohibiting assistance to Iraq, directly, through third countries, or through international organizations.

C. The Reports of the Senate and House Appropriations Committees.

The Report of the Senate Committee on Appropriations on what became EWSAA explicitly confirms this meaning of the proviso—removing limitations on assistance for Iraq. It says, in the only reference to the authorities contained in this proviso: "The Committee provides the request for the repeal of the Iraqi Sanctions Act of 1990, *and other limitations on assistance for Iraq.*"[17] (Emphasis added.)

Similarly, the Report of the Committee on Appropriations of the House of Representatives notes the genesis of Section 1503 from the "authority requested by the President" and identifies it as authorizing "the President to make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act with respect to Iraq."[18] Further, a section at the end of the Report entitled "Changes in the Application of Existing Law,"[19] required by House rules, fails to mention any provision of FSIA or the

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[17] S. Rep. No. 108-33, at 21 (2003).

[18] H.R. Rep. No. 108-55, at 30 (2003).

[19] *Id.* at 44–48.

Judiciary Code despite expressly listing sections 620A and 307 of the Foreign Assistance Act and over four pages of other affected laws. The House Report further identifies the specific constitutional power to enact the proposed bill as "Clause 7 of Section 9 of Article 1 of the Constitution," stating that "[n]o money shall be drawn from the Treasury but in consequence of Appropriations made by law," signaling clearly that the House regards its actions as affecting appropriations.[20] There is no reference to Article III, the location of the power of Congress to strip the jurisdiction of the courts. It should also be noted that the House Report contains a section entitled "Salute to the Forces" that honors members of the armed forces.[21] It is absurd to believe that during an ongoing war that a Committee, which went out of its way to salute the forces, would vote 59-0 to authorize retroactive removal of the jurisdiction of the Article III courts over pending cases to hold Iraq accountable for its torture of American POWs.

D. The House/Senate Conference Report.

Again, the Conference Report cites merely the Iraq Sanctions Act and sections 620A and 307 of the Foreign Assistance Act as the relevant authorities in question providing in relevant part: "[t]he conference agreement, under section 1503, includes a provision similar to the House bill that would make inapplicable the Iraq Sanctions Act of 1990 and authorize the President to

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[20] *Id*. at 49. This, of course, is also evident from assignment of EWSAA to the House and Senate Appropriation Committees.

[21] *Id*. at 12.

make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act with respect to Iraq."[22] There is not the slightest indication in this Report that Congress intended to authorize the President to make inapplicable any part of FSIA much less retroactively remove the jurisdiction of an Article III court effectively absolving Iraq of its liability for the torture of American POWs or "human shield" victims.[23]

E. The Legislative Record Regarding the Judiciary.

There is in Title I of EWSAA a heading "THE JUDICIARY." This section contains only additional appropriations for three courts, not including the District Court for the District of Columbia, for the purpose of added police protection and security. If Congress intended to authorize removal of the

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[22] H.R. Rep. No. 108-76, at 76 (2003).

[23] Certainly one of the reasons for consulting legislative history with care is the concern that legislative history might be manufactured in committee reports or otherwise might not reflect the overall intent of the legislative body. Where, as here, the very point of consulting the legislative history is to demonstrate, through a complete absence of reference, that the issue was never considered by the Congress, other than to seek to implement a very different purpose conveyed to them in writing by the Executive, that concern is of little merit. Moreover, when the President drafts a clause for Congress and tells Congress in writing what it means, surely such history is of enormous importance as history permeating the entire process of legislative consideration.

jurisdiction of an Article III court over pending cases, surely such a provision would have been referenced in the only provision of EWSAA referencing the judiciary.

F. The Presidential Determination.

Finally, in reviewing the Presidential Determination of May 7, 2003, which the Government relies on as an exercise of any authority delegated to the President under section 1503, there is no mention of the FSIA, immunity, jurisdiction, the courts, the judiciary, judicial procedure, pending cases, POWs, or human shield victims, much less retroactive withdrawal of jurisdiction of an Article III court. Nor does it make any statement with respect to the scope of laws included within section 1503, or the meaning of "make inapplicable." *See* 68 Fed. Reg. 26549. Further, it does specifically cite the Iraq Sanctions Act with a level of specificity down to naming a specific section of that Act not affected, and section 620A of the Foreign Assistance Act of 1961, and, on both laws specifically identified, it even gives the full public law cite. *See id.* Moreover, the title of the Presidential Determination includes the phrase "Making Inapplicable Certain Statutory Provisions Relating to Iraq." *Id.* This implies identification of the affected statutory provisions, yet there is no mention of FSIA.

Since the Determination also rewrites the coordinating conjunction between the dependent clauses with an "and" instead of an "or," the Presidential Determination negates the Government's argument that section 1503 has a textual "plain meaning" supporting the Executive's interpretation. Finally, the FSIA was not mentioned by the Executive Branch—not in the

presidential submission of language to the Congress, not in the Presidential Determination itself, not in a dedicated or timely inclusion in the *Federal Register*, and not in any notice to Congress or the designated committees of Congress. Rather, it seems to have been an afterthought by the Administration for purposes of litigation when no plausible legal basis could be found to seek to set aside the POWs' historic judgment.[24]

G. Summary of the Legislative Record of Section 1503.

The history, as well as the text, is persuasive that the purpose of section 1503 was to permit expeditious removal of limitations on assistance to Iraq, as embodied in the Foreign Assistance Act. The presidential presentation to Congress specifies the purpose as permitting removal of limitations contained in three provisions of the Foreign Assistance Act, while specifying both the three provisions and the Act. The Senate Committee Report, House Committee Report, and Conference Report, citing both the provisions and the Act, speak either only of limitations on assistance, or name only specific provisions of the Foreign Assistance Act limiting assistance, as their only analysis of section 1503. Even if the text had a plain meaning, this level of clarity from the legislative record compels

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[24] Senators George Allen and Harry Reid objected to the "Administration's use of an emergency supplemental appropriations bill for purpose never intended or discussed with Congress." Letter from Senator George Allen to the Honorable John W. Snow, Secretary of the Treasury, of August 4, 2003; Letter from Senator Harry Reid to the Honorable Colin Powell, Secretary of State, of August 5, 2003. *See* App. B.

an interpretation that will follow the persuasive evidence as to purpose. As Justice Holmes wrote: "It is said that when the meaning of language is plain, we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928). *See also, e.g., Consumer Prod. Safety Commn v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980); *Cal. Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284–85 (1987); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 222 & n.20 (1981).

III. The Legislative History of FSIA Reflects an Important Interest in Judicial Determination of Civil Actions Against Foreign States and Nothing in Section 1503 Provides the Slightest Indication that Congress Sought to Abandon this Interest.

The purpose of the FSIA, enacted over a quarter of a century ago, was to transfer determinations about immunity from the State Department to the courts. Thus, the Congress provided in section 1602 of FSIA:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice . . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1602 (2006). The courts recognize the core purpose of FSIA was to remove immunity decisions from

the Executive to the courts, for decisions to be based on legal ground rather than political. Thus, as noted most recently in *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 177–78 (2d Cir. 2003), *vacated and remanded*, 542 U.S. 901 (2004):

> As a result of these inadequacies [in pre-FSIA Executive Branch determinations concerning sovereign immunity] Congress in 1976 enacted the FSIA, a statute aimed to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to assure litigants that . . . decisions are made on purely legal grounds under procedures that insure due process." *Verlinden*, 461 U.S. at 488 (quoting H.R. Rep. No. 94-1487, at 7) (1976).

See also, e.g., Joo v. Japan, 332 F.3d 679, 686 (D.C. Cir. 2003).

There is not the slightest indication in either the text or legislative history of section 1503 of EWSAA that the Congress believed that it was reversing this long-standing congressional purpose much less that it was doing so retroactively for pending cases before the courts. Any reversal of this important congressional purpose should require explicit language and should not be inferred from general language enacted with absolutely no legislative or textual consideration of the issue. As the Supreme Court recently noted in *Whitman v. American Trucking Associations*, 531 U.S. 457, 468

(2001), "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."

IV. The Legislative History of Section 1605 of the FSIA and Related Provisions of Section 1610 of the FSIA Reflect an Important Congressional Determination to Permit Civil Suits Against States Designated as Terrorist States at the Time the Act in Question Occurred, and Nothing in Section 1503 Indicates that Congress Sought to Abandon this Interest.

For over a decade, the Congress and the Department of State have fought a running battle over permitting civil suits against States designated as terrorist States.[25] It is no accident that sections 1605(a)(7) and 1610 of the FSIA, the provisions sought to be "made inapplicable" by the Government, embody the core provisions disfavored by the Department of State in this ongoing

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[25] For an examination of why the State Department's view in opposing civil suits against terror States in their killing and torturing of Americans is old thinking, see John Norton Moore, *Introduction to Civil Litigation Against Terrorism* 3, 3–26 (John Norton Moore ed., 2004). As one beginning question, why should we shield terror States in our courts in settings in which the U.S. Government would be fully liable and subject to suit? And why, when we have for over a quarter century permitted suits against foreign States in our courts under FSIA for their contract and property violations, should we give them a pass for the killing and torturing of Americans in violation of the most widely adhered international agreements in the world?

struggle between the branches. Section 1605(a)(7) permits civil suits by American plaintiffs in certain settings following rejection by the State concerned of international arbitration of the dispute. Section 1610 permits recovery against the non-diplomatic commercial assets of that state in the United States. And Congress is aware that the critical date for the terrorist designation in these actions is the time the act occurred, or when the country is later designated as a terrorist State as a result of the terrorist act. FSIA § 1605(a)(7)(A). Moreover, when Congress amended the FSIA in 1996 to authorize these actions it expressly provided that its amendment "shall apply to any cause of action arising before, on, or after the date of enactment of this Act." 28 U.S.C. § 1605 (historical and statutory notes); *see also* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. 105-277, 112 Stat. 2681-491 (employing similar language with respect to 28 U.S.C. § 1610 that made certain assets of terrorist States subject to execution and attachment in aid of execution). These clear temporal designations by Congress in relation to section 1605(a)(7) actions show that it has a specific, clearly expressed, intent that the critical date for terrorist designation in these actions is the time the act occurred that is the subject of suit. In this case that is 1990.

Given the vigorous struggle between the branches, it simply does not compute that Congress would have completely conceded its long-held position to the Executive without a single reference in the legislative record or any dissenting votes to the provision asserted by the Executive as having this effect. Is it a coincidence that the only three statutory provisions suddenly

discovered as an afterthought by the Executive on May 22nd, but never previously mentioned to Congress in the consideration of EWSAA, were the disputed sections 1605 and 1610 of the FSIA and section 201 of the TRIA?[26] The Executive's belated May 22nd reinterpretation of section 1503 is a deliberate attempt to prevail over what the Executive well knows to be the true intent of Congress. Surely, given the long-running battle between the Congress and the Executive about these actions, general language in an appropriation bill not mentioning the FSIA or the underlying issues in dispute should not be interpreted as applying to the FSIA. And even if it were, it should not be interpreted to override the specifically expressed congressional intent in the FSIA that the critical date for the terror designation is the time the act occurred so as to retroactively remove the jurisdiction of an Article III court.

V. A Supplemental Principle of Statutory Interpretation Concerning United States Adherence to Its Treaty Obligations Also Supports Affirmance.

Iraq has been held liable in the United States District Court for the torture of American POWs and this matter is still pending before the courts. Common Article 131 of the Geneva POW Convention, binding on both the United States and Iraq, provides: "No High Contracting Party shall be allowed to absolve itself or

[26] The additional language of the May 22nd Message added only to the May 7th Presidential Determination that: "Such provisions of law that apply to countries that have supported terrorism include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610, and section 201 of TRIA."

any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches . . .” which includes torture of POWs. 6 U.S.T. 3316, art. 131. The Government, through its section 1503 argument seeks effectively to absolve Iraq of liability. Since the Convention is clear in saying that the parties cannot absolve another party *of any liability,* the Government is seeking an interpretation of an act of Congress to permit an action in violation of a solemn treaty obligation of the United States. An important principle of the foreign relations law of the United States is that “[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.” Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987). This principle, known as the principle of the *Charming Betsy* case, was announced by Chief Justice Marshall in the early days of the Republic. In the words of Marshall, “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804).

The Government has sought in their previous arguments to rebut the power of this core principle of the foreign relations law of the United States by asserting that the POW Convention does not guarantee any particular forum. That is true, but irrelevant. Article 131 of the POW Convention sets out a general principle that prohibits absolving a torturing State of “any liability.” If Iraq does not fear liability in United States courts, why has it brought this petition to the Supreme

Court seeking to wipe out its liability? The Convention is clear; a party to the treaty cannot absolve another party of *any liability* for the torture of POWs.

CONCLUSION

The judgments of the Court of Appeals should be affirmed.

Respectfully submitted,

JEFFREY F. ADDICOTT
Director
CENTER FOR TERRORISM LAW
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228
(210) 431-2219

Counsel for Amici Curiae

APPENDIX

DISTINGUISHED AMERICAN FORMER HIGH-LEVEL MILITARY APPENDING THEIR NAMES TO THIS BRIEF AS *AMICI CURIAE*

Vice Admiral (Ret.) James H. Doyle, Jr.,
United States Navy

Former Deputy Chief of Naval Operations
Former Commander, U.S. Third Fleet

Major General (Ret.) Alfred A. Valenzuela,
United States Army, Formerly Commander,
United States Army South, Deputy Commanding
General, United States Southern Command, and
Deputy Joint Task Force Panama Commander

Lieutenant General (Ret.) CJ Le Van,
United States Army
Former J3, Operations Branch,
Joint Chiefs of Staff

The Honorable Joe Sestak,
Member of Congress